

**COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF TAX APPEALS
FILE NO. K06-R-04**

DIRECT CARRIERS, INC.

APPELLANT

VS.

ORDER NO. K-19828

**TRANSPORTATION CABINET
COMMONWEALTH OF KENTUCKY**

APPELLEE

This is an appeal from the final ruling of the Transportation Cabinet, Commonwealth of Kentucky, resulting from the audit of the Appellant, Direct Carriers, Inc. imposing additional tax assessments against the Appellant, with regard to IFTA and KYU taxes during the audit periods of July 1, 2001 to June 30, 2004 (Audit Period).

The matter was tried before the Board of Tax Appeals on December 13, 2006 with both parties sponsoring various documents and testimony into evidence.

In addition, as a result of the Board's ruling to exclude certain documents and testimony regarding those documents as a sanction for non-compliance with the pre-hearing orders of the board relating to disclosure of documents, certain testimony was placed of record by Appellant by avowal.

After considering the evidence, arguments and briefs of both parties the Board makes the following **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.**

FINDINGS OF FACT

Direct Carriers (hereinafter Appellant) is a trucking company operating from a location in Rush Kentucky. As a part of its business Appellant hauls propane, asphalt,

chemicals and other products for hire. The Appellant operates in Kentucky and other states as well.

For the first few years of operation the Appellant had an admittedly unsophisticated accounting system. When audited by the Department of Transportation the Appellant provided what documents it had for the calculation of taxes due during a sample period determined to be the third quarter of 2003. Any under or over reporting of taxes during this period was applied over the entire 12 quarters of the Audit Period.

The auditor assigned to the project reviewed the documents provided by the Appellant, conducted an examination of other data available to him including average miles per gallon for Eastern Kentucky Trucking operations, mapping and distance calculation software and statements made by the Appellant in explanation of the calculations on his tax returns.

Appellant argued that the Cabinet's assessment ignored relevant evidence and that the assessment was based upon faulty error rates.

Appellant's entire case centered on the relief it sought that this Board order the Cabinet to conduct a new audit.

Appellant did not provide the board with evidence on all issues necessary to complete the new audit it was seeking, rather it spent its entire proof time pointing out alleged errors in the Cabinet's audit methods.

The Cabinet produced the auditor who testified regarding his audit methods providing the Board with specifics not only as to his methodology but also introduced documentary evidence in support of those methods and his findings.

CONCLUSIONS OF LAW

The Appellant has argued exclusively for remand to the Cabinet for a new audit. Appellant argues that KRS 13B.120 (2) & (7) when read together, give the Kentucky Board of Tax Appeals the right to remand the entire case to the Cabinet with instructions to re-audit the taxpayer and to consider additional information developed since the audit was concluded.

However, by statute a hearing before the Kentucky Board of Tax Appeals is a de novo hearing. It is not enough for the taxpayer to seek to prove that a better audit could have been conducted. In a de novo hearing the taxpayer must provide enough evidence to allow the Board to make a specific finding as to what the result of that better audit would be.

In this case the Appellant's evidence suggested that the audit was faulty but also left the Board with the clear impression that the tax amounts it claimed on its returns would likely be changed if a new audit was done by the Cabinet. Without offering admissible proof as to what those new amounts would be the Appellant did not meet its burden of proof as to this important step in the review process.

Instead Appellant urges the Board to remand the matter to the Cabinet with orders to conduct a new audit. While the Appellant cites the above statute as authority for this outcome it does not appear that this statute has ever been interpreted by a Kentucky Court to authorize this result. Until such time as this occurs, the Board is not inclined to interpret the meaning of this statute so broadly.

It is not enough for an Appellant to merely point out that the Cabinet's final ruling contains errors. The Appellant must offer alternative proof that will allow the Board to

make a specific finding regarding the taxes which Appellant believes the evidence will support. In this case the Appellant pulled up short.

As such the Board must affirm the final ruling of the Transportation Cabinet.

FINAL ORDER

It is the FINAL ORDER of the Kentucky Board of Tax Appeals that the final ruling of the Transportation Cabinet, Division of Road Fund Audits which is the subject of this appeal, is affirmed.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

**DATE OF ORDER
AND MAILING: May 1, 2007**

**KENTUCKY BOARD OF TAX APPEALS
FULL BOARD CONCURRING**

**NANCY MITCHELL
CHAIR**